Supreme Court, U.S.
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No. 00 448

IN THE

Supreme Court of the United States

CAGUAS CENTRAL FEDERAL SAVINGS BANK,

Petitioners,

MARIA VICTORIA VAZQUEZ; SEVERIANO CODERO; MARIA VASQUEZ; HILDA RUIZ; LORENZO MUÑOZ-FRANCO; FAUSTINO FRANQUIZ; ANA D. MARRERO; FELIX BALIÑAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS IN WINSTAR V. UNITED STATES, 518 U.S. 839 (1996) AND LYNCE V. MATHIS, (1997), 137 L.ED. 2D 63, 71. THE PRACTICAL CONSEQUENCES THAT FLOW FROM THE DECISION BELOW WOULD RESULT IN A SELF IMMUNIZATION BY THE GOVERNMENT FROM THE CONSEQUENCES OF THE DECISION OF THIS COURT IN WINSTAR, SUPRA, - HOLDING THE GOVERNMENT LIABLE FOR BREACH OF CONTRACT - WITH THE IMPLICATIONS THAT THE SOVEREIGN CAN RENEGED WITH IMPUNITY ON THE DEALS IT MAKES WITH ITS CITIZENS. THIS IS IN DIRECT CONFLICT WITH THE BASIC WINSTAR PRINCIPLES AND THEIR APPLICATION IN LYNCE V. MATHIS, ID. AT 71.

2. THE COURT BELOW DECIDED QUESTIONS OF FEDERAL LAW THAT HAVE FAR REACHING IMPLICATIONS AND ARE MATTERS OF FIRST IMPRESSION NEVER BEFORE ADDRESSED BY THIS COURT IN THE CONTEXT OF CONTRACTUAL RELATIONSHIPS WITH THE FEDERAL GOVERNMENT IN WINSTAR-RELATED CLAIMS.

i. WHETHER THE REVISED TOLLING AGREEMENT ENTERED INTO BY THE RTC-RECEIVER AND THE UNITED STATES JUSTICE DEPARTMENT PRESERVED WINSTAR-RELATED CLAIMS ON SEPTEMBER 25, 1995 ON BEHALF OF CAGUAS AND CAGUAS RECEIVERSHIP ESTATE.

ii. WHETHER PETITIONERS AS A MATTER OF FEDERAL LAW FALL WITHIN A STATUTORY CLASS

CLEARLY INTENDED TO BE BENEFITTED BY THE TOLLING AGREEMENT.

iii. WHETHER PETITIONER MAY BRING WINSTAR-RELATED CLAIMS DERIVATELY ON BEHALF OF THE CAGUAS RECEIVERSHIP.

iv. WHETHER THE TOLLING AGREEMENT EFFECTIVELY TOLL THE STATUTE OF LIMITATIONS AS TO PETITIONERS' WINSTAR-RELATED CLAIMS ON BEHALF OF THE CAGUAS RECEIVERSHIP ESTATE.

v. WHETHER THE INTERPRETATION THAT COURT BELOW MADE OF THE TOLLING AGREEMENT CONSTITUTE A STATUTORY AND CONSTITUTIONAL IMPERMISIBLE DENIAL OF THE PETITIONERS RIGHT TO PROTECT THEIR VESTED PROPERTY INTERESTS AGAINST DISTRUCTION OF WINSTAR-RELATED "GOODWILL" CLAIMS AND IRREPARABLE DAMAGES AND PREJUDICE AS A RESULT OF THE MERE PASSAGE OF TIME.

vi. WHETHER PETITIONERS IN WINSTAR-RELATED CLAIMS THAT ARE PART OF CAGUAS' RECEIVERSHIP ESTATE FOR THE BENEFIT OF THE OWNERS OF THE ESTATE WERE PROTECTED BY THE TOLLING AGREEMENT AND IDENTIFY THESE CLAIMS ARE NOT BASED BY THE RELEVANT STATUTE OF LIMITATION FOR SUCH CLAIMS .

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Respondent

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion issued by the Court of Federal Claims below is appendix "A" infra. The affirmance on June 21, 2000 by the United States Court of Appeals for the Federal District appears at appendix "B". Caguas Central Federal Savings Bank, et al. v. United States, No. 99-5084, Fed. Cir., June 21,2000. Consent of FDIC To Appear As an Involuntary Plaintiff in Case, October 30, 1998 is appendix "C".

JURISDICTION OF THE COURT

This petition by Caguas Central Federal Savings Bank ("Caguas"); María Victoria Vázquez; Severiano Cordero; Maria Vazquez; Hilda Ruiz; Lorenzo Muñoz-Franco; Faustino Franquiz; Ana D. Marrero; Felix Baliñas is for the issuance of a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the opinion filed and judgement entered on June 21, 2000 and for additional relief vacating such judgment.

Petitioners have asserted that the Court of Federal Claims has subject-matter jurisdiction over this claims on the basis that they are Winstar-related "goodwill" claims brought against United States Government as derivative claims and as statutory third party beneficiaries to the tolling agreement to which FDIC became a successor on behalf of the receivership's estate.

The Court of Federal Claims has jurisdiction to hear such claims pursuant to 28 USC §1491(a)(1); 12 USC §1821(d)(11)(A) and revised tolling agreement entered into by the RTC and the Department of Justice on September 29, 1995 for the benefit of the receivership estate, however, the Court of Federal Claims dismiss petitioners' claims, principally because it held that the court lacked subject-matter jurisdiction on the ground that the claims asserted by plaintiffs were untimely.

The United Court of Appeals For the Federal Circuit affirmed on appeal from the final decision of the Federal Court of Claims on the jurisdictional ground that the claims accrued more than six years before the complaint was filed and the suit was untimely; that the tolling agreement between RTC and United States Government did not covere Caguas' nor its receivership estate and that petitioner were not third party beneficiaries of it, therefore the six year period provided by the Tucker Act, 28 USC §2501 (1994) had not been tolled. Accordingly it concluded that the court

of Federal Claims had no jurisdiction to entertain the complaint and properly dismissed it for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS IN WINSTAR V. UNITED STATES, 518 U.S. 839 (1996) AND LYNCE V. MATHIS, (1997), 137 L.ED. 2D 63, 71. THE PRACTICAL CONSEQUENCES THAT FLOW FROM THE DECISION BELOW WOULD RESULT IN A SELF IMMUNIZATION BY THE GOVERNMENT FROM THE CONSEQUENCES OF THE DECISION OF THIS COURT IN WINSTAR, SUPRA, HOLDING THE GOVERNMENT LIABLE FOR BREACH OF CONTRACT WITH THE IMPLICATION THAT THE SOVEREIGN CAN RENEGED WITH IMPUNITY ON THE DEALS IT MAKES WITH ITS CITIZENS. THIS IS IN DIRECT CONFLICT WITH THE BASIC WINSTAR PRINCIPLES AND THEIR APPLICATION IN LYNCE V. MATHIS, ID. AT 71.

2. THE DECISION BELOW DECIDED QUESTIONS OF FEDERAL LAW THAT HAVE FAR REACHING IMPLICATIONS AND ARE MATTERS OF FIRST IMPRESSION NEVER BEFORE ADDRESSED BY THIS COURT IN THE CONTEXT OF CONTRACTUAL RELATIONSHIPS WITH THE FEDERAL GOVERNMENT IN WINSTAR-RELATED CLAIMS, OF A SEIZED SAVINGS BANK CANNOT BRING WINSTAR-RELATED GOODWILL CLAIM IN A DERIVATE SUIT ON BEHALF OF THE CLOSED BANK OR ITS RECEIVERSHIP ESTATE, BASE ON CORPORATE, TRUST PRINCIPLES, AND ON GROUNDS OF CONFLICT OF INTEREST ON THE

PART OF THE RECEIVER. WHETHER FOR PURPOSE OF THE TOLLING AGREEMENT ENTERED BY RTC RECEIVER, SUCEEDED BY FDIC-RECEIVER WITH THE UNITED STATES GOVERNMENT IN 1995, MEMBERS OF A SEIZED AND CLOSED SAVINGS BANK CONSTITUTE AS A MATTER OF FEDERAL LAW A CLASS CLEARLY INTENDED TO BE BENEFITTED BY SUCH TOLLING AGREEMENT.

STATEMENT OF THE CASE

Petitioners María Victoria Vazquez, Severiano Cordero, María Vazquez, Hilda Ruiz, Lorenzo Muñoz-Franco, Faustino Franquiz, Ana D. Marrero and Felix Baliñas, are all former members of Caguas Central Federal Savings Bank ("Caguas"). Caguas was a mutual savings bank that fell out of compliance with the new regulatory capital requirements set by Financial Institution Reform Recovery Act ("FIRREA") and the regulations adopted pursuant to it as a result of the swift and severe impact that FIRREA had on thrifts institution that had entered, induced by the government into supervisory mergers with insolvent institution, it made them subject to seizure by thrift regulators as was the case of Caguas, that was placed into conservatorship and receivership by the Office of Thrift Supervision in 1990. The FDIC is currently the receiver for Caguas.

On October 21, 1998, petitioners filed a complaint derivately on behalf of Caguas and Caguas estate receivership against defendant United States of America ("The Government") with the Court of Federal Claims.

Petitioners named and subsequently served the FDIC as an involuntary plaintiff in the action to appear as involuntary plaintiff. FDIC consented.

> "Because the FDIC has notice of this action, and has been served a copy of the complaint and

> because the FDIC has Winstar-related interest that should be asserted in this case the FDIC hereby consents to being joined and appearing in this case as an involuntary plaintiff." (Emphasis supplied).

The FDIC took the position that technically it was never a party to the action and consequently, neither a party to the appeal. Although the FDIC conceded that "the court appears to have considered the consent as the required motion to add a necessary party.

On March 1, 1999, the Court issued a one-page decision granting the Government's motion and dismissing the complaint on grounds that the Court lacked subject-matter jurisdiction over the complaint because the claims were untimely filed, and that petitioners had failed to state a claim against the Government. The Court held that the tolling agreement was "strictly limited in its application to the parties, if it is enforceable at all" (id.). The Court rejected petitioners' position that they were third-party beneficiaries of the tolling agreement, finding, instead that the "parties to the tolling agreement did not show an interest in creating any rights" in petitioners. The Court did not address petitioners allegations regarding the incapacity of the FDIC-Receiver to prosecute the Winstar-related claims of the Caguas receivership estate because of conflict of interest, nor application of the corporate law principles as grounds for the right of petitioners to filed a derivative claim.

A final judgement dismissing the complaint was entered on March 2, 1999. FDIC did not file an appeal.

The United States Court of Appeals for the Federal Circuit affirmed in an opinion and judgement entered June 21, 2000 on the grounds that the complaint in this case was not filed within six years of the accrual of the claims asserted and that period has not been tolled, because neither

Caguas nor the estate were covered by the tolling agreement and the members were not third parties beneficiaries of said agreement, accordingly the Court of Federal Claims had no jurisdiction to entertain this complaint and dismissed it for lack of jurisdiction.

THE FACTS

A. PETITIONERS

Caguas was a mutual savings bank that was placed into conservatorship and receivership by the Office of Thrift Supervision in 1990.

As stated above, Petitioners were all members of Caguas at the time Caguas was placed into receivership. Some of the petitioners were also accountholders and employees of Caguas. Caguas operated as a minority institution that was one of the main providers, if not the main provider, of affordable housing financing in Puerto Rico and the Caribbean under the Caribbean Basin Initiative.

The following facts material to a decision and contrary to the findings and conclusion of the court below are not disputed on the record: (a) FDIC-Receiver in its answer to some of the petitioners' claims in several letters recognized as of September 8, 1997 that Caguas was protected by tolling agreement and the claims of the Caguas receivership remain tolled; it also consented to be joined and to appear in the instant case as an involuntary plaintiff "because the FDIC has Winstar-related interest that should be asserted in this case."

B. In the early 1980's Caguas entered into several acquisition agreements, assistance agreements, promises, assurances and understandings with the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"), whereby Caguas agreed

to enter into supervisory mergers with two insolvent financial institutions. The Winstar-related goodwill claims has factual underpining almost identical to those of *Winstar v. United States*, 839 (1996).

QUESTIONS PRESENTED

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS IN *WINSTAR v. UNITED STATES*, 518 U.S. 839 (1996) AND *LYNCE v. MATHIS*, (1997), 137 L.ED. 2D 63, 71. THE PRACTICAL CONSEQUENCES THAT FLOW FROM THE DECISION BELOW WOULD RESULT IN A SELF IMMUNIZATION BY THE GOVERNMENT FROM THE CONSEQUENCES OF THE DECISION OF THIS COURT IN *WINSTAR, SUPRA*, - HOLDING THE GOVERNMENT LIABLE FOR BREACH OF CONTRACT - WITH THE IMPLICATIONS THAT THE SOVEREIGN CAN RENEGED WITH IMPUNITY ON THE DEALS IT MAKES WITH ITS CITIZENS. THIS IS IN DIRECT CONFLICT WITH THE BASIC WINSTAR PRINCIPLES AND THEIR APPLICATION IN *LYNCE v. MATHIS*, ID. AT 71.

2. THE COURT BELOW DECIDED QUESTIONS OF FEDERAL LAW THAT HAVE FAR REACHING IMPLICATIONS AND ARE MATTERS OF FIRST IMPRESSION NEVER BEFORE ADDRESSED BY THIS COURT IN THE CONTEXT OF CONTRACTUAL RELATIONSHIPS WITH THE FEDERAL GOVERNMENT IN WINSTAR-RELATED CLAIMS.

i. WHETHER THE REVISED TOLLING AGREEMENT ENTERED INTO BY THE RTC-RECEIVER AND THE UNITED STATES JUSTICE DEPARTMENT PRESERVED WINSTAR-RELATED

CLAIMS ON SEPTEMBER 25, 1995 ON BEHALF OF CAGUAS AND CAGUAS RECEIVERSHIP ESTATE.

ii. WHETHER PETITIONERS AS A MATTER OF FEDERAL LAW FALL WITHIN A STATUTORY CLASS CLEARLY INTENDED TO BE BENEFITTED BY THE TOLLING AGREEMENT.

iii. WHETHER PETITIONER MAY BRING WINSTAR-RELATED CLAIMS DERIVATELY ON BEHALF OF THE CAGUAS RECEIVERSHIP.

iv. WHETHER THE TOLLING AGREEMENT EFFECTIVELY TOLL THE STATUTE OF LIMITATIONS AS TO PETITIONERS' WINSTAR-RELATED CLAIMS ON BEHALF OF THE CAGUAS RECEIVERSHIP ESTATE.

v. WHETHER THE INTERPRETATION THAT COURT BELOW MADE OF THE TOLLING AGREEMENT CONSTITUTE A STATUTORY AND CONSTITUTIONAL IMPERMISIBLE DENIAL OF THE PETITIONERS RIGHT TO PROTECT THEIR VESTED PROPERTY INTERESTS AGAINST DISTRUCTION OF WINSTAR-RELATED "GOODWILL" CLAIMS AND IRREPARABLE DAMAGES AND PREJUDICE AS A RESULT OF THE MERE PASSAGE OF TIME.

vi. WHETHER PETITIONERS IN WINSTAR-RELATED CLAIMS THAT ARE PART OF CAGUAS' RECEIVERSHIP ESTATE FOR THE BENEFIT OF THE OWNERS OF THE ESTATE WERE PROTECTED BY THE TOLLING AGREEMENT AND IDENTIFY THESE CLAIMS ARE NOT BASED BY THE

RELEVANT STATUTE OF LIMITATION FOR SUCH CLAIMS .

ARGUMENT

Winstar-related "goodwill" claims as a matter of Federal Law are assets that are the property of those classes included in the statutory priority distribution system who may have an ultimate derivate interest as owners of the estates' assets. These assets include any damages received from the Winstar-related "goodwill" claims that will flow to the estate and ultimately could inure to the benefit of members as part of the priority distribution scheme. These assets are not the property of the regulatory agencies acting in its capacity as receiver. A a matter of law the receiverships' estate is an interim legal entity with a congressional mandate to collect assets that belong to the institution placed in receivership; maximize the amount of assets recovered; proceed to realize upon the assets of the institution, 12 USC §1821(d)(2)(E); dispose of any assets garner by the receiver in accordance with the specific priority distribution scheme or manner, 12 USC §1821(d)(2) to the statutory classes established by Congress that include members and accountholders. FDIC as receiver successor to RTC must operate within the bounds of the congressional mandate and powers and within the constitutional limits of said power. Any tolling agreement that would freeze Winstar related "goodwill" claims and exclude from prosecution of Winstar-related claims, by ultimate beneficiaries of the assets of the receivership estate to which damages from such claims will flow and inure to their benefits would leave to the unfettered discretion of the FDIC the prosecution of such claims that FDIC already has admitted in is appearance as involuntary plaintiff should be asserted. This would be in violation of applicable federal law and run afoul of the constitutional protection of

property rights of the members as part of one of the classes clearly intended to be benefitted by the collection of assets mandated by Congress that includes the prosecution of Winstar-related "goodwill" claims.

The Law is clear that petitioners as former members of Caguas, were third party beneficiaries of the agreement between Caguas and the Government that form the basis for the Winstar-related goodwill claims (neither RTC nor FDIC were signatory parties in those agreements).

It is equally clear that petitioners have a direct, vested interest in the Caguas receivership estate as a matter of law under the Federal Deposit Insurance Act, as amended, 12 USC §1821(d)(11)(A), and therefore it follows that they may bring Winstar-related claims derivatively on behalf of the Caguas receivership estate. The law imposes a duty on the FDIC-Receiver to "maximize" recovery of assets on behalf of the receivership estate and for the benefit of the classes included in the statutory priority distribution scheme. One of which are members and accountholders of Caguas. The Winstar-related goodwill claim is a substantial asset, if not the most important asset of the estate. The tolling agreements entered into with the government were intended to protect this claims for the benefit of the receivership estates and its statutory beneficiaries, that includes petitioners as members and accountholders.

It is well-settled that the owners or members of a failed savings institution are third party beneficiaries of the assistance agreements with the FHLBB that permitted goodwill created from the acquisition of certain other financial institutions to be used to satisfy regulatory capital requirements. *Branch v. United States,* 69 F.3d 1571, 1575 (Fed. Cir. 1995, cert. denied, 519 U.S. 810 (1996); *California Housing Sec. Inc. v. United States,* 959 F.2d 955, 957 n.2 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992); *Glass v. United States*, Case No. 92-428C, 1999 U.S. Claims LEXIS 145 at *16-19 (June 15, 1999); *Castle*

v. United States, 42 Fed. Cl. 859, 864 (1999). The fact that these individuals were not named in the assistance agreements does not defeat their status as third-party beneficiaries. As stated by one court, "the intended beneficiary [need not]...be specifically or individually identified in the contract[;]" rather, it is sufficient that the beneficiary "fall within a class clearly intended to be benefitted" by the contract. *Castle*, 42 Fed. Cl. at 866 (*citing*, *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997); *see also Glass*, 1999 U.S. Claims LEXIS at 19. The estate is an interim legal entity that exist to collect assets and maximize their amount.

Petitioners were all members of Caguas when it agreed to acquire United Federal and Home Federal, as well as when it was placed into receivership. Accordingly, petitioner are third party beneficiaries to the agreements between the Government and Caguas that give rise to the Winstar-related claims asserted in the Complaint. *See Castle,* 42 Fed. Cl. at 866.

As former members of Caguas, Petitioners also have a statutory right to distribution of assets that is generated by the receivership estate. 12 U.S.C. §1821(d)(11)A). *See Castle,* 42 Fed. Cl. at 864. The courts have held that this statutory right entitles owners or members of a failed savings institution to assert derivately Winstar-related claims against the Government. *See Suess v. United States*, 33 Fed. Cl. 89, 96 (1995).

In upholding this right of the former owners or members of a failed savings institution, the courts have analogized to the corporate shareholder context, stating that:

> [j]ust as the receiver stands in the shoes of the former institution's management and directors for all governance, the shareholders have the same derivative rights to remedy its failure to assert corporate interests as they have with

> respect to a negligent corporate management via the derivative action against third parties who have injured the corporation. Nothing in the statutory scheme turns the receiver into an "infallible" manager with "unfettered discretion" just because the receiver happens to be the government.

Id.' *See also Statesman*, 41 Fed. Cl. at 17. The courts have stated that to hold otherwise would be "a bold departure from common law adjudicatory principles[,] would place unfettered discretion in the hands of FDIC-Receiver, and might deny shareholders any avenue of redress should the FDIC improperly neglect to assert the failed institution's rights." *Suess*, 33 Fed. Cl. at 96 (*citing Branch v. FDIC*, 825 F. Supp. 384, 404-405 (D. Mass. 1993)).

Accordingly, the law is clear that Petitioners are entitled to bring Winstar-related claims derivately on behalf of Caguas, especially where the receiver has failed to safeguard the rights of the receivership estate. *Glass*, 1999 U.S. Claims LEXIS 145 at *16-19; *Suess*, 33 Fed. Cl. at 96; *see also Branch*, 69 F. 3d at 1575; *California Housing*, 959 F.2d at 957 n.2; *Castle*, 42 Fed. Cl. at 864.

The Federal Deposit Insurance Act, 12 U.S.C. §1821(d)(2)(E), confers on the FDIC the duty to "realize upon the assets of the institution," and, in doing so, to "maximize the amount of assets recovered" on behalf of the institution's receivership estate. Statesman, 41 Fed. Cl. at 12. It is axiomatic that the FDIC, as receiver, possesses a fiduciary duty to the receivership estate, as well as to the shareholders or members of the former institution. *First Nat'l Ins. Co. v. FDIC*, 977 F. Supp. 1051, 1059 (S.D. Cal. 1997); *Fleet Nat'l Bank v. H&D Enter, Inc.*, 926 F. Supp. 226, 240 (D. Mass. 1996), *aff'd*, 96 F. 3d 532 (1st Cir. 1996); *County of Oakland v. Detroit*, 784 F. Supp.

1275, 1286 (E.D. Mich. 1992). In fact, "[t]he goal of a receiver charged with liquidating assets is to obtain the highest price available under the circumstances." *Fleet*, 926 F. Supp. at 240; *see also, Statesman*, 41 Fed. Cl. at 12. The FDIC breaches its duty to the receivership estate and the institution's members where it "negligently or intentionally caus[es] the receivership estate to forfeit its assets." *First Nat'l*, 977 F. Supp. at 1059.

As set forth in the complaint, petitioners initiated this derivative action on behalf of Caguas because the FDIC-Receiver is squandering the valuable asset of the receivership estate represented by these Winstar-related claims. Petitioners alleged that the FDIC has not asserted these Winstar-related claims because of certain conflicts of interest. (Id.). Petitioners also alleged that the failure of the FDIC to initiate such Winstar-related claims against the Government is not confined to Caguas. As alleged in the complaint, the FDIC has not initiated Winstar-related claims against the Government with respect to any savings institution, notwithstanding the fact that it acts as receiver with respect to more than 200 such institutions that entered into similar assistance agreements with the Government.

The conflict of interest that impairs the ability of the FDIC-Receiver to assert these claims has been recognized by the courts. As stated by the Court of Federal Claims in *Suess:*

> [u]ltimately, the government in the instant case...is faced with a conflict of interest. The government contends that the RTC is in the best position to sue on behalf of the shareholders since as receiver it is statutorily obligated to look after all parties' interests. The government fails to appreciate the disingenuousness of this position. It is a little like the fox arguing that it is in a better position to know the chickens'

> interests than the chickens. [The Office of Thrift Supervision], an arm of the Treasury Department, made the decision to put [the institution] into receivership. RTC, another arm of the Treasury Department, is the receiver. Finally, the government is also the debtor whose alleged breach of contract led to the receivership in the first place!
>
> *Suess*, 33 Fed. Cl. at 97.

As suggested by the Court of Federal Claims in *Suess*, the right of petitioners to assert Winstar-related claims with respect to the Caguas receivership estate is grounded in traditional fiduciary or corporate law principles, particularly as it relates to alleged failures by the FDIC-Receiver to protect the interest of the receivership estate. *Suess*, 33 Fed. Cl. at 96 ("shareholders [of failed savings institution] have the same derivative rights to remedy [the receiver's failure] to assert corporate interests as they have with respect to a negligent corporate management via the derivative action against third parties who have injured the corporation"). This right of petitioners also has roots in the law of trusts.

Under trust law principles it is axiomatic that "where a claim exists in favor of the trust against third persons and the trustee is under a duty to enforce that claim and has improperly and unjustifiably failed to do so, the beneficiary may bring a suit on behalf of the trust." *Benenson v. Fleischman*, No. 94 Civ. 5009, 1995 U.S. Dist. LEXIS 6636 at *12-13 (S.D.N.Y. May 18, 1995) (citation omitted). This principle is well established. "If the trustee refuses to bring the action, after demand, or fails to act, or...the trustee has an adverse interest...the beneficiary may bring the action againstthe third party." *Edgeworth v. First Nat'l Bank of Chicago*, 677 F. Supp. 982, 990 (S.D.Ind. 1988).[1]

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[1] As with derivative-type claims in the corporate context, demand on a

The same may be said for the FDIC-Receiver. See generally *Suess*, 33 Fed. Cl. at 96. As persons with a statutorily-created direct and vested interest in the Caguas receivership estate, petitioners are entitled to assert the Winstar-related claims of the receivership estate where the FDIC-Receiver has improperly refused to assert, or is prevented by conflicts of interest from asserting, those claims. Id.; See Restatement (Second) of Trusts §§177, 282(2) (1959) (where trustee improperly refuses or neglects to bring an action against a third person, the beneficiary can maintain a suit to enforce the right); *Nedd v. United Mine Workers of America*, 556 F. 2d 190, 197 (3rd Cir. 1977), *cert.denied*, 434 U.S. 1013 (1978); *In re New England Mutual Life Ins. Co. Litig.*, 841 F. Supp. 345, 348 (W.D. Wa. 1994), *aff'd*, 54 F. 3d 786 (9th Cir. 1995); *Edgeworth*, 677 F. Supp. at 990-91.

Importantly, under these circumstances, the law does not consider that the beneficiary is enforcing his own cause of action. Rather, a beneficiary is deemed to be acting as "a temporary representative of the trust in order to effect a recovery which will go to the trustee or his successor for the benefit of the beneficiary." *Edgeworth*, 677 F. Supp. at 990 (quoting George G. Bogert, The Law of Trusts & Trustees §869, at 92-94 (2d. ed. 1982) (emphasis added). See also 4 Austin W. Scott et al, The Law of Trusts §327.1, at 324 (1989) ("if the trustee cannot or will not enforce the cause of action which he has against the third person, the

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trustee to bring such claims is excused upon "a showing that...because of the trustee['s] conflict of interest, or some other reason, it is futile to make such a demand." *Benenson*, 1995 U.S. Dist. LEXIS 6636 at *13 (quoting *Velez v. Feinstein*, 451 N.Y.S.2d 110, 115). As alleged in the complaint, the inherent conflicts of interest of the FDIC-Receiver with respect to Caguas-namely the demonstrated reluctance or unwillingness by the FDIC to commence litigation that would result in the federal government suing itself-effectively rendered demand futile in this case.

beneficiary is allowed to enforce it by a suit in which the third person and the trustee are joined, in order that the claim may not be lost or prejudiced").

Similarly, in this case, Petitioners were not seeking to enforce their own direct cause of action. Rather, they asserted these claims as representatives of the Caguas receivership estate because the FDIC failed to pursue these Winstar related claims in violation of its fiduciary duties to the estate. In doing so, they named the FDIC as involuntary plaintiff. The FDIC later consented to appear and participate in this action, declaring that it has "Winstar-related interests that should be asserted in this case."

The Court of Federal Claims not only failed to decide the issues related to the alleged conflicts of interest and breaches of duty by the FDIC-Receiver, but it could not possibly have resolved these matters- drawing all reasonable inferences in favor of Appellants- on the initial pleadings. Accordingly, the Court of Federal Claims erred in dismissing Appellants' claims for lack of subject matter jurisdiction.

As noted, Petitioners asserted Winstar-related claims on behalf of the Caguas receivership estate based upon allegations that, among other things, the FDIC-Receiver, which is charged with a duty to maximize recovery for the receivership estate, was tainted by conflicts of interest and had improperly failed to pursue those claims. These Winstar-related claims do not belong directly or solely to Petitioners or to other former members of Caguas. Rather, they are claims of the receivership estate that are protected from the six year statute of limitations contained in 28 U.S.C. §2501 by the Tolling Agreement. The unwillingness or inability of the FDIC-Receiver to bring these claims on behalf of Caguas, as alleged in the complaint, enables petitioners to "plead through" the FDIC consistent with the terms of the Tolling Agreement. See generally Restatement

(Second) of Trusts §§177, 282(2) (1959) (where trustee improperly refuses or neglects to bring an action against a third person, the beneficiary can maintain a suit to enforce the right). Accordingly, the Court below erred in finding, without any meaningful analysis, that those claims were time-barred on their face.

The Tolling Agreement between the Government and the predecessor of the FDIC-Receiver protects the Winstar-related claims of the Caguas receivership estate from the six (6) year statute of limitations that otherwise would be applicable to such claims. Specifically, the Tolling Agreement provides that Winstar-related claims with respect to, among others, the Caguas receivership estate, "shall be tolled from the date of [the] Agreement to and including one hundred-thirty (130) days after the entry of either a final and unappealable judgment in the case known as Winstar Corp. v. United States of America... or the entry of an order dismissing that case." (*See Statesman*, 41 Fed. Cl. at 14. To date, there has been no final disposition of the Winstar Corp. action and the Tolling Agreement remains operative by its terms. As statutory successor to the RTC, the FDIC is the successor-in-interest with respect to the RTC's rights under the Tolling Agreement. The FDIC-Receiver has confirmed its understanding that the Winstar-related claims with respect to Caguas are protected under the Tolling Agreement. (See Letter of Michael P. Condon, Sept. 8, 1997)).

The Government appears to concede that the Tolling Agreement was initially negotiated and entered into for the purpose of protecting these Winstar-related claims from the six (6) year statute of limitations. However, during the proceedings below, the Government sought to attack the viability of these claims by arguing that the claims themselves, and all rights of the receivership estate under the Tolling Agreement, were extinguished when the FDIC became Manager of the FSLIC Resolution Fund. (Def.'s

Mot. to Dismiss at 10-17. In particular, the Government argued that the FDIC is foreclosed from asserting these claims because the FDIC, in both its corporate capacity and as Manager of the FSLIC Resolution Fund, which theoretically owns these claims, is an agent of the federal government and thus cannot sue itself to recover on these claims.

The Government's argument was rejected recently by the Court of Federal Claims in another Winstar-related case. Specifically, the Court held that the FDIC is the proper "successor in interest" to bring Winstar-related claims against the Government on behalf of a failed financial institution for which it was the receiver and that Winstar-related claims belonging to the failed institution were not extinguished during the transfer of the assets from the RTC, in its capacity as receiver, to the RTC, in its corporate capacity, and thereafter to the FSLIC Resolution Fund. Glass, 1999 U.S. Claims LEXIS 145 at *22-23. Thus, it is clear that such claims survived the dissolution of the RTC and that the Winstar-related claims with respect to the Caguas receivership estate are protected under the Tolling Agreement. Id.

The Court of Federal Claims committed error in dismissing on the initial pleadings petitioners' allegations that the Winstar-related claims asserted on behalf of Caguas are preserved by the Tolling Agreement. The Tolling Agreement evidences an express or implied intent to benefit the Caguas receivership estate, in which petitioners have a distinct, statutory interest. *Montana,* 124 F.3d at 1273-74; *D&H Distributing Co. v. US.*, 102 F. 3d 542, 547 (Fed. Cir. 1996); *Schuerman v. United States,* 30 Fed. Cl. 420, 433 (1994). The fact that petitioners are not signatories to, or named in, the Tolling Agreement is not fatal to their claims.

It is a fundamental principle of contract law that parties to a contract may create enforceable contract rights in an

unspecified third party. See Restatement (Second) of Contracts §304 (1979); *Beckett v. Air Line Pilots Ass'n*, 995 F. 2d 280, 286-87 (D.C. Cir. 1993). The "intended third-party beneficiary...need not be specifically or individually identified in the contract but must fall within a class clearly intended to be benefitted thereby." *Montana*, 124 F.3d at 1273-74; *D&H Distrib.*, 102 F. 3d at 547; *Schuerman*, 30 Fed. Cl. at 433.

Just as petitioners are third party beneficiaries of the assistance agreements between the FHLBB and Caguas, even though they are not signatories to or named in those agreements, petitioners - who are not signatories to the Tolling Agreement but who represent the receivership estate under the Complaint - are nonetheless entitled to its protection because it preserves claims on behalf of the Caguas receivership estate in which they have a statutorily-created, direct and vested interest. Whether the Winstar-related claims are brought by the FDIC-Receiver, as successor to the RTC, or derivatively by the Appellants, is immaterial. See *MCC Proceeds, Inc. v. Whitman & Ransom*, No. 95 Civ 10086 (RPP), 1997 U.S. Dist. LEXIS 7517 at *6-8 (S.D.N.Y. May 28, 1997) (tolling agreement is binding on all of the individual partners of a law firm even though executed on behalf of the partnership as a whole); *Lindner Dividend Fund, Inc. v. Ernst & Young*, 880 F. supp. 49, 55 (D. Mass. 1995) (tolling agreement protects plaintiffs who were nonparties to the agreement where agreement was executed by named plaintiffs in class litigation on behalf of all members of a putative class). There is no language in the Tolling Agreement that belies this assertion.

It is well-settled that the statute of "limitation applicable to an action by [a] corporation at law is equally applicable to the suit of [a] shareholder upon the corporate right of action in equity." 3A William Meade Fletcher et al.,

Fletcher Cyclopedia of the Law of Private Corporations §1304, at 668 (perm. ed. rev. vol. 1994); 12B Fletcher Cyclopedia §5886, at 367 (perm. ed. rev. vol. 1993). See also Bogert, Trusts and Trustees §954, at 675 (rev. 2d ed. 1995) ("a cause of action arises in favor of the trustee and the running of the Statute of Limitations is controlled by the status of the trustee as to notice of the wrong and as to disabilities."); *Crittenden v. Dorn*, 274 F. 520, 532-33 (9th Cir.), *cert. denied*, 257 U.S. 648 (1921); *Woodcock v. American Inv. Co.*, 380 N.E. 2d 624, 627 (Mass. 1978); *Jones v. Idaho*, 432 P. 2d 420, 424 (Idaho 1967). In holding that Petitioners are not intended beneficiaries of the Tolling Agreement and that their claims are time-barred, the Court of Federal Claims incorrectly overlooked the derivative nature of these claims, as well as the Petitioners' allegations regarding the conflicts of interest and breaches of duty of the FDIC-Receiver.

At bottom, Petitioners have asserted claims on behalf of the receivership estate of Caguas. Those claims were clearly intended to be preserved by the Tolling Agreement which was entered into between the institution's receiver and the Government, and which has recently been upheld by the Court of Federal Claims. Whether the claims are brought on behalf of the Caguas receivership estate by the FDIC-Receiver, or by Petitioners, in the face of conflicts of interest affecting the receiver, should not affect the applicability of the Tolling Agreement to those claims. This was particularly true where, as in the court below, the receiver has agreed to participate in the case as involuntary plaintiff.

The claims asserted below by petitioners are the same claims that are protected by the tolling agreement. The shorthand dismissal of the complaint by the Court of Federal Claims affirmed by the Federal Circuit Court is particularly distressing because in addition to the reason summarize in the preceding paragraphs, the FDIC-Receiver

had consented to participate in the prosecution of these Winstar-related goodwill claims as "involuntary plaintiff" on the grounds that there are Winstar-related interest that should be asserted. The Federal Circuit Court decision concludes that there is Winstar goodwill related claim but the petitioners claim to prosecute the same is time barred.

CONCLUSION

For the foregoing reasons, petitioners respectfully request review, reversal and remand for further proceedings of the Judgment and opinion entered and file by the Court below with issuance of a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Dated: September 19, 2000

Respectfully submitted:

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Appendix

Appendix A

In The United States Court of Federal Claims

No. 98-804 C

FILED MAR. 1, 1999

CAGUAS CENTRAL FEDERAL SAVINGS BANK, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

We do not address the issue of whether plaintiffs' allegations concerning breach of trust present a cause of action for which relief may be granted in this court because such an action would not be timely in any event. We view the "tolling agreement" as being strictly limited in its applicaiion to the parties, if it is enforceable at all. Plaintiffs point out a "principle of contract law that paz-ties to a contract may create enforceable contract rights in an unspecified third party." (citations omitted). If so, the parties to the tolling agreement did not show an interest in creating any rights in these plaintiffs. For these reasons, the Clerk will dismiss plaintiffs' case for lack of jurisdiction and for failure to-state a claim for which relief may be granted. No costs.

Robert H. Hodges, Jr.
Judge

Appendix B

99-5084

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CAGUAS CENTRAL FEDERAL SAVINGS BANK,
Plaintiff,

and

MARIA VICTORIA VAZQUEZ, SEVERIANO CORDERO, MARIA VAZQUEZ, HILDA RUIZ, LORENZO MUNOZ FRANCO, FAUSTINO FRANQUIZ, ANA D. MARRERO and FELIX BALINAS,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

June 21, 2000, Decided

Appealed from: United States Court of Federal Claims.
Judge Robert H. Hodges, Jr.
DISPOSITION: AFFIRMED.

COUNSEL:

Stephen G. Topetzes, Kirkpatrick & Lockhart LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief was Stavroula E. Lambrakopoulos.

Jeanne E. Davidson, Deputy Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were David W. Ogden, Acting Assistant

Attorney General; David M. Cohen, Director; and Gregory R. Firehock, Trial Attorney.

John V. Thomas, Assistant General Counsel, Federal Deposit Insurance Corporation, of Washington, DC, for amicus curiae Federal Deposit Insurance Corporation. With him on the brief was Dorothy Ashley Doherty, Counsel. Of counsel was William A. Gray, of Washington, DC.

JUDGES: Before PLAGER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and RADER, Circuit Judge.

OPINION: FRIEDMAN, Senior Circuit Judge.

n insolvent savings and loan association and several of its former members brought this action in the United States Court of Federal Claims seeking damages from the United States for the government's alleged breach of its contractual commitment to permit the association to use a particular favorable accounting treatment of the goodwill it had acquired in connection with its merger in the early 1980's with two financially troubled savings and loan associations. The regulatory authority ended that accounting treatment pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("1989 Act"), which prohibited that treatment. The Court of Federal Claims dismissed the complaint as barred by the statute of limitations and for failing to state a claim upon which relief may be granted. We agree with the trial court that the statute of limitations bars this suit, and therefore affirm its dismissal of the case on that ground.

I

A. 1. The background facts relating to the savings and loan industry's financial problems out of which this case arose are described in United States v. Winstar Corp., 518 U.S. 839, 844-858, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996). They may be summarized as follows:

In the early 1980's the savings and loan industry had a

financial crisis that resulted because many firms had "long-term, fixed-rate mortgages created when interest rates were low; when market rates rose, those institutions had to raise the rates they paid to depositors in order to attract funds. When the costs of short-term deposits overtook the revenues from long-term mortgages, some 435 thrifts failed between 1981 and 1983." Id. at 845 (citations omitted). "While the regulators tried to mitigate the squeeze on the thrift industry generally through deregulation, the multitude of already-failed savings and loans confronted FSLIC [Federal Savings and Loan Insurance Corporation] with deposit insurance liabilities that threatened to exhaust its insurance fund." Id. at 846.

"Realizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the Bank Board chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of 'supervisory mergers.' . . . The principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations . . . . [This would] permit[] the acquiring entity to designate the excess of the purchase price over the fair value of all identifiable assets acquired as an intangible asset called . . . '[supervisory] goodwill.' . . . The acquiring institutions [could] count supervisory goodwill toward their reserve requirements . . . ." Id. at 847-50.

"The overall regulatory response of the early and mid-1980's was unsuccessful in resolving the crisis in the thrift industry. As a result, Congress enacted the [1989 Act, which] made enormous changes in the structure of federal thrift regulation," including eliminating supervisory goodwill as a capital asset and "establishing the Resolution Trust Corporation to liquidate or otherwise dispose of

certain closed thrifts and their assets." Id. at 856 (citation omitted).

"The impact of [the 1989 Act's] new capital requirements upon institutions that had acquired failed thrifts in exchange for supervisory goodwill was swift and severe. [The regulatory agency] promptly issued regulations implementing the new capital standards along with a bulletin noting that [the 1989 Act] 'eliminates [capital and accounting] forbearances' previously granted to certain thrifts . . . . Many institutions immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators." Id. at 857-58.

2. Winstar involved three suits filed in the Court of Federal Claims by entities that had acquired failed savings and loans associations pursuant to, as this court found, "negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time." Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995). The suits sought damages for the injuries the entities sustained as a result of the 1989 Act's prohibition upon the use of supervisory goodwill. The Supreme Court affirmed the conclusion of this court that "the Government breached these contracts when, pursuant to the new regulatory capital requirements imposed by [the 1989 Act] the federal regulatory agencies limited the use of supervisory goodwill and capital credits in calculating [*6] respondents' net worth," and that "the United States is liable to respondents for breach of contract." Winstar, 518 U.S. at 870, 910. The Court remanded the case for further proceedings "because the Court of Federal Claims had not yet determined the appropriate measure or amount of damages." Id. at 910.

B. On September 29, 1995 the Resolution Trust Corporation and the Department of Justice entered into an

agreement tolling the statute of limitations. The agreement began with a number of "RECITALS," including the statements that "the RTC may possess certain claims against the United States arising out of the enactment of certain provisions of the" 1989 Act and its implementing regulations; "the RTC contends that these changes may have breached contractual obligations of the FHLBB to some institutions for which the RTC has been appointed receiver, or may have otherwise damaged these institutions. These claims shall be referred to herein as 'Goodwill Claims'"; "the RTC and the United States both desire to avoid litigation of these Goodwill Claims" and "both intend to try to resolve these Goodwill Claims, if any, at the appropriate time, by amicable measures in order to avoid costly and contentious litigation." The agreement then provided: "the parties agree to toll the statute of limitations that may apply to Goodwill Claims, as set forth below."

The first three operative provisions of the agreement were as follows:

> 1. The running of the statute of limitations for all Goodwill Claims the RTC may possess shall be tolled from the date of this Agreement to and including one hundred-thirty (130) days after the entry of either a final and unappealable judgment in [the Winstar case (in which such judgment has not yet been entered)].
>
> 2. During the first one hundred-twenty days of the period referred to in paragraph 1, the parties shall attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess.
>
> 3. Following the conclusion of the one hundred-twenty day period specified in paragraph 2, the RTC shall have ten (10) days in which to file suit on any Goodwill Claim not amicably resolved by the parties. Any such claim filed by the RTC

against the United States within this ten day period shall be deemed by the United States, for the purposes of computation of the statute of limitations, to have been filed on August 8, 1995, and the United States agrees that it will not raise the statute of limitations as a defense in that litigation.

C. The present suit was filed in the Court of Federal Claims on October 21, 1998 by Caguas Central Federal Savings Bank (Caguas), a mutual savings and loan association that is in receivership, and eight individuals who formerly were members and account holders of Caguas ("the Members"). Complaint, PP 23-31, 35. The complaint described the suit as a "derivative action" and stated that the individual plaintiffs "as members and account holders have an ultimate derivative interest in the Caguas Central Federal Bank Receivership Estate resulting from their right to any surplus." Id., PP 6, 38.

The complaint included the following allegations:

At the request of the federal regulatory agencies, Caguas in 1982 and 1984 acquired two insolvent savings and loan associations, United Federal and Home Federal. Id., PP 7, 55, 60. In so doing, it relied upon the regulatory agencies' agreement that "supervisory goodwill resulting from the merger would be counted as part of the regulatory net worth requirement." Id., PP 15, 16, 55. By enacting and implementing the 1989 Act, "the United States reneged on its contractual commitments concerning regulatory capital accounting, amortization, accretion period and other assistance and forbearances, for the United Federal and Home Federal acquisitions. The government required Caguas to deduct immediately from its regulatory capital much of the goodwill acquired in the United Federal and Home Federal acquisitions." Id., P 20. "The Federal regulatory authorities . . . determined that with the

exclusion from net worth of the supervisory goodwill, subordinated notes and other forbearances previously contracted with Caguas, Caguas could not comply with the new capital requirements," and placed Caguas in receivership. Id., P 70.

The Federal Deposit Insurance Company, as the successor to the Resolution Trust Corporation and receiver of Caguas, "had the obligation to institute the present action on behalf of the receivership but has neglected to do so due to several conflicts of interests." Id., P 35. "These conflicts of interest have caused the FDIC to fail to pursue claims against the United States of America that would inure to the benefit of the members, directors, officers, and account holders of Caguas . . . . The FDIC has failed to take any steps to pursue claims against the United States of America related to the government's breach of its contractual commitments to Caguas regarding the treatment of supervisory goodwill." Id., P 40. The individual "plaintiffs are now asserting these claims 'derivatively' on behalf of Caguas." Id.

The complaint contained eleven counts seeking damages on various theories, including breach of contract and just compensation for the taking of Caguas' property, and also sought restitution. See id., PP 79-124.

On the government's motion, the Court of Federal Claims dismissed the complaint "for lack of jurisdiction and for failure to state a claim for which relief may be granted." Caguas Central Federal Savings Bank v. United States, No. 98-804C (Ct. Fed. Cl. Mar. 1, 1999). In a short order, the court explained:

> We do not address the issue of whether plaintiffs' allegations concerning breach of trust present a cause of action for which relief may be granted in this court because such an action would not be timely in any event. We view the "tolling agreement" as being strictly limited in its

application to the parties, if it is enforceable at all. Plaintiffs point out a "principle of contract law that parties to a contract may create enforceable contract rights in an unspecified third party." (citations omitted). If so, the parties to the tolling agreement did not show an interest in creating any rights in these plaintiffs. For these reasons, the Clerk will dismiss plaintiffs' case for lack of jurisdiction and for failure to state a claim for which relief may be granted.

II

A. A claim in the Court of Federal Claims must be "filed within six years after such claim first accrues." 28 U.S.C. §2501 (1994). The complaint in this case was filed on October 21, 1998. For the suit to have been timely, the claims asserted must have accrued no earlier than October 21, 1992.

The complaint contended that the government breached its contractual commitment to permit Caguas to use supervisory goodwill when the 1989 Act banned that practice and the implementing regulations compelled Caguas to end it, thereby resulting in Caguas's receivership. Here, as is Ariadne Fin. Servs. Pty., Ltd. v. United States, 133 F.3d 874, 879-80 (Fed. Cir. 1998), "before . . . the critical date [of October 21, 1992,] the government had enacted a statutory prohibition on the use of supervisory goodwill and issued regulations enforcing this prohibition. It then issued a notice of intent to apply these regulations to thrifts . . . . The government ordered "'all savings associations presently operating with these forbearances . . . [to] eliminate them in determining whether or not they comply with the new minimum regulatory capital standards.'" The government took these actions well before October 21, 1992 and therefore, the claims in this case accrued more than six

years before the complaint was filed and the suit was untimely.

B. To avoid the limitations bar, the Members invoke the tolling agreement. They contend (1) that they are third party beneficiaries of it and (2) that the agreement itself covers Caguas, in whose behalf they have brought this suit.

1. Ordinarily, only the parties to a contract have rights thereunder that they may enforce. See, e.g., First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1289 (Fed. Cir. 1999). The parties, however, may create rights for the benefit of third persons, which those persons may then vindicate and enforce as third party beneficiaries of the contract. See id. For there to be third party beneficiaries, however, "the contract must 'reflect[] the express or implied intention of the parties to benefit the third party.' . . . The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby." State of Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (quoting Schuerman v. United States, 30 Fed. Cl. 420, 433 (1994)); see also Restatement (Second) of Contracts §302(1) (1979).

Nothing in the tolling agreement, however, even suggests, much less establishes, that the parties to it intended to toll the statute of limitations for suits brought by members of an insolvent savings and loans association on behalf of the association. The agreement, which tolls the "running of the statute of limitations for all Goodwill Claims the RTC may possess" until 130 days after the final disposition of Winstar, provides that during the first 120 of those 130 days "the parties [the Resolution Trust Corporation and the Department of Justice] shall attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess"; that, after the 120 day period, "the RTC shall have ten (10) days in which to file suit on any Goodwill Claim not amicably resolved by

the parties"; and that "any such claim filed by the RTC against the United States within this ten day period shall be deemed by the United States, for the purposes of computation of the statute of limitations, to have been filed on August 8, 1995, and the United States agrees that it will not raise the statute of limitations as a defense in that litigation." On their face, these provisions toll the statute of limitations only for cases filed by the Resolution Trust Corporation on Goodwill Claims it possesses. They do not toll the statute on claims filed not by the Resolution Trust Corporation, but by former members of an insolvent savings and loans associations on behalf of the association.

This conclusion is supported by the purpose of the tolling agreement. It reflected the parties' hopes and anticipation that once Winstar finally was decided—a decision that presumably would define the governing principals for these Goodwill Claims—the parties would be able to settle the claims "without litigation." The agreement provided that for claims not settled within the 120 days, the Resolution Trust Corporation would have 10 additional days to file suit, and those suits should be deemed to have been filed on August 8, 1995, which was six years after the 1989 Act became effective.

There is no reason why the parties to the tolling agreement would have wished to extend the tolling provisions to cover suits brought by savings and loans association members on behalf of their association. To permit such suits while the Resolution Trust Corporation claims were tolled would be inconsistent with the theory underlying the tolling agreement that, once Winstar finally was decided, the other claims could be "amicably" resolved "without litigation." The purpose of the tolling agreement was "to avoid litigation of these Goodwill Claims,"" not to permit litigation of those claims by third persons.

2. Our reasoning in denying the Members' third party beneficiary claims also requires rejection of their alternative

argument that the tolling agreement itself covers Caguas, on whose behalf they are suing. Caguas was not a party to that agreement, and it did not become one merely because any recovery the Resolution Trust Corporation might obtain on Caguas' claims would be for Caguas' benefit. As pointed out above, the purpose of the tolling agreement was to freeze the situation until Winstar was finally determined, in the hope that thereafter the remaining supervisory Goodwill Claims that the Resolution Trust Corporation possessed—including those of Caguas—could be amicably settled without litigation. The tolling agreement was not intended to facilitate litigation in the interim by savings and loans institutions themselves.

The Members contend that the Court of Federal Claims erred in not deciding whether they could assert these claims derivatively on behalf of Caguas since Caguas' receiver (the Federal Deposit Insurance Corporation, successor to the Resolution Trust Corporation) failed to institute suit on them because of its conflict of interest. They argue that because of this conflict, they may step into the shoes of the receiver and assert on behalf of Caguas the claims that the receiver should have, but improperly failed to assert. Once again, for the reasons already given, the tolling agreement does not cover such a suit. If the Federal Deposit Insurance Corporation has been derelict in the performance of its duties to Caguas, as the Members complain, the proper remedy would have been a suit against the Federal Deposit Insurance Company, not one against the United States.

C. In the Court of Federal Claims, the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. §1491(a)(1). See Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). The complaint in this case was not filed within six years of the accrual of the claims asserted, and that period has not been tolled. Accordingly,

the Court of Federal Claims had no jurisdiction to entertain the complaint, and properly dismissed it for lack of jurisdiction.

In view of our disposition of the case, it is unnecessary for us to address the question whether the statute of limitations applicable to the Court of Federal Claims is waivable by the Government, as was done under the tolling agreement here. Thus, we offer no opinion on that question.

CONCLUSION

The judgment of the Court of Federal Claims dismissing the complaint is

AFFIRMED.

Appendix C

In The United States Court of Federal Claims

CAGUAS CENTRAL FEDERAL SAVINGS BANK,
Plaintiff,

and

MARIA VICTORIA VAZQUEZ, SEVERIANO CORDERO, MARIA VAZQUEZ, HILDA RUIZ, LORENZO MUNOZ FRANCO, FAUSTINO FRANQUIZ, ANA D. MARRERO and FELIX BALINAS,
Plaintiffs-Appellants,

FEDERAL DEPOSIT INSURANCE CORPORATION
Involuntary Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Civil Action No. 98-804C

CONSENT TO APPEAR AS AN INVOLUNTARY PLAINTIFF IN CASE

The Federal Deposit Insurance Corporation ("FDIC") hereby respectfully represents to the Court

1) On October 21, 1998, Plaintiffs Caguas Central Federal Savings Bank, *et al*, filed a Complaint in this Court against the United States of America, Case No. 98-8040 The FDIC

was named, and subseqently served, as Involuntary Plaintiff.

2) On information and belief Plaintiffs have failed to move the Court for an order joining the FDIC as a party in this action, as required by Rules 19 and 14 of the rules of this Court.

3) As alleged in Paragraph 35 of Plaintiff's Complaint, the FDIC was included as an involuntary plaintiff "because without (the FDIC's) presence complete relief cannot be accorded in this case" Complaint at ¶ 35.

4) Based on further allegations in plaintiff's complaint, this action is related to the Winstar-related cases Winstar Corp. v. United States. No. 90-8C (filed January 2, 1990). Specifically, it is alleged that "[O]n August 9.1989, when FIRREA was enacted into law, the government directly and deliberately abrogated its contractual agreements with Caguas regarding regulatory capital treatment and amortization of the goodwill resulting from the United Federal and Home Federal acquisitions and regarding certain forbearancesand indemnities." Complaint ¶ 72.

5) Because the FDIC has notice 6f this action, and has bern served a copy of the Complaint, and because the FD(C has Sipa-related intern that should be asserted in this case, the FDIC hereby consents to being joined and appearing in this case as an Involuntary Plaintiff

Respectfully Submitted,

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Supreme Court, U.S.
FILED
NOV 24 2000

(2)

No. 00-448

In the Supreme Court of the United States

CAGUAS CENTRAL FEDERAL SAVINGS BANK, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the court of appeals erred in holding that petitioners' complaint was untimely.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A14) is reported at 215 F.3d 1304. The order of the Court of Federal Claims (Pet. App. A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2000. The petition for a writ of certiorari was filed on September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the financial crisis that enveloped the savings and loan industry in the early 1980s, Congress enacted the Financial Institutions Reform, Re-

covery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. FIRREA made sweeping changes to the regulatory framework governing thrifts. The Act abolished the Federal Home Loan Bank Board (FHLBB) and replaced it with the Office of Thrift Supervision (OTS); abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and replaced it with the Federal Deposit Insurance Corporation (FDIC); and created the Resolution Trust Corporation (RTC) as a temporary agency designed to resolve the thrift crisis. FIRREA also phased out the ability of thrifts to count "goodwill" toward meeting regulatory capital requirements. OTS promptly issued regulations implementing FIRREA's new regulatory capital standards. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 856-857 (1996).

The adoption of FIRREA and regulations implementing its regulatory capital requirements resulted in numerous law suits similar to the *Winstar* action. The actions were typically brought by thrifts, holding companies, and individuals claiming that, in connection with their acquisition of savings and loan associations in the 1980s, they had entered into contracts with the federal government, through FSLIC and FHLBB, regarding the treatment of goodwill for purposes of calculating regulatory capital, and that in the wake of FIRREA federal regulators had impermissibly failed to honor those agreements. See 518 U.S. at 858-859; Pet. App. A5-A6. In *Winstar*, this Court held that the United States was liable for breach of contracts providing for the treatment of goodwill for purposes of calculating regulatory capital, and remanded for a determination of damages. See 518 U.S. at 910.

On September 29, 1995, the Department of Justice (DOJ) and the RTC entered into an agreement provid-

ing for alternative dispute resolution of the *Winstar*-related claims that the RTC may possess in its capacity as receiver of failed thrifts. The agreement contained a number of "RECITALS," including that "the RTC may possess certain claims against the United States arising out of the enactment of certain provisions of" FIRREA and its implementing regulations; "the RTC contends that these changes may have breached contractual obligations of the FHLBB to some institutions for which the RTC has been appointed receiver, or may have otherwise damaged these institutions. These claims shall be referred to herein as 'Goodwill Claims'"; and "the RTC and the United States both desire to avoid litigation of these Goodwill Claims" and "both intend to try to resolve these Goodwill Claims, if any, at the appropriate time, by amicable measures in order to avoid costly and contentious litigation." Pet. App. A7 (quoting agreement).

The agreement further provided that "the parties agree to toll the statute of limitations that may apply to Goodwill Claims, as set forth below." Pet. App. A7 (quoting agreement); see 28 U.S.C. 2501 (establishing six-year statute of limitations for filing claims in the Court of Federal Claims). The first three provisos of the tolling provision were as follows:

> 1. The running of the statute of limitations for all Goodwill Claims the RTC may possess shall be tolled from the date of this Agreement to and including one hundred-thirty (130) days after the entry of either a final and unappealable judgment in [the *Winstar* case (in which such judgment has not yet been entered)].
>
> 2. During the first one hundred-twenty days of the period referred to in paragraph 1, the parties shall

> attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess.
>
> 3. Following the conclusion of the one hundred-twenty day period specified in paragraph 2, the RTC shall have ten (10) days in which to file suit on any Goodwill Claim not amicably resolved by the parties. Any such claim filed by the RTC against the United States within this ten day period shall be deemed by the United States, for the purposes of computation of the statute of limitations, to have been filed on August 8, 1995, and the United States agrees that it will not raise the statute of limitations as a defense in that litigation.

Pet. App. A7 (quoting agreement).

Because final judgment has not yet been entered in the original *Winstar* action, the period of review and settlement of claims—which must precede the filing of any claims subject to the September 29, 1995, agreement—has not yet commenced. Meanwhile, substantial doubt has arisen as to whether the agreement's tolling provision is enforceable. The statute of limitations for filing claims against the United States in the Court of Federal Claims is a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. 1491(a) (1994 & Supp. IV 1998). And the Court of Federal Claims has recently "reject[ed] the notion that litigating parties can modify the terms that Congress has specified for the initiation of [such claims]," and therefore has held that the tolling agreement between the RTC and DOJ is "a legal nullity." *Castle* v. *United States*, No. 90-1291 C, 2000 WL 1690248, at *4 (Fed. Cl. Nov. 9, 2000).

2. Petitioner Caguas Central Federal Savings Bank (Caguas) acquired two thrifts in the early 1980s. In

connection with those acquisitions, federal regulators provided various forms of financial assistance to Caguas, including loans, notes, and indemnification, which were memorialized in "assistance agreements" containing integration clauses. Compl. 4-7. The agreements approved the use of goodwill to meet regulatory capital requirements. *Id.* at 4-6. Following the enactment of FIRREA and the implementation of its regulatory capital requirements, Caguas became insolvent and, in 1990, was placed by OTS into receivership administered by the RTC. In 1995, the FDIC succeeded the RTC as receiver.

On October 21, 1998, Caguas and certain former members and account holders of Caguas, petitioners here, filed this action derivatively on behalf of Caguas, alleging claims similar to those described in *Winstar*. Pet. App. A8-A9. The claims were based on events that took place in the 1980s, namely the acquisition of the thrifts and treatment of those acquisitions for accounting purposes. The complaint alleged that the FDIC, as the successor to the RTC, "had the obligation to institute the present action on behalf of the receivership but has neglected to do so due to several conflicts of interests." *Id.* at A9 (quoting complaint). The government moved to dismiss for lack of jurisdiction, arguing that the action was barred by the six-year statute of limitations applicable to claims against the United States filed in the Court of Federal Claims. 28 U.S.C. 2501.

Petitioners acknowledged that their claims normally would be time barred by the statute of limitations. But they argued that the claims were preserved by the tolling agreement entered into by DOJ and the RTC, claiming that they were third-party beneficiaries of that agreement. Because the FDIC (as successor to the

RTC) had not taken action to assert the thrift's claims, petitioners also contended that they were entitled to step into the shoes of the receiver and assert any claims remaining in the receivership estate, on the ground that the FDIC was not diligently pursuing these claims due to a conflict of interest. The FDIC responded by arguing that—to the extent it was enforceable at all—the tolling agreement only applied to the RTC (or the FDIC, as its successor) and DOJ, and not to third parties.

The Court of Federal Claims dismissed the complaint for lack of jurisdiction and failure to state a claim for which relief may be granted. Pet. App. A1. The court "view[ed] the 'tolling agreement' as being strictly limited in its application to the parties [*i.e.*, the RTC and DOJ], if it is enforceable at all." *Ibid.* With respect to petitioners' claim that the agreement created rights in third parties, namely Caguas or its members, the court concluded that "the parties to the tolling agreement did not show an interest in creating any rights in these plaintiffs." *Ibid.*

3. The Federal Circuit affirmed. Pet. App. A3-A14. The court of appeals first rejected the argument that petitioners were third-party beneficiaries of the tolling agreement. As the court explained, "[n]othing in the tolling agreement * * * even suggests, much less establishes, that the parties to it intended to toll the statute of limitations for suits brought by members of an insolvent savings and loan association on behalf of the association." *Id.* at A11. Rather, by its terms, the agreement "toll[s] the statute of limitations only for cases filed by [the RTC] on Goodwill Claims it possesses." *Id.* at A12. Moreover, petitioners' third-party beneficiary theory is inconsistent with the express purpose of the agreement—"that, once *Winstar* finally

was decided, the other [*Winstar*-type] claims could be 'amicably' resolved 'without litigation,'" and "not to permit litigation of those claims by third parties." *Ibid.* (quoting agreement).

The court of appeals also rejected petitioners' argument that the FDIC failed to protect petitioners' interest because of a "conflict of interest," and that "because of this conflict, they may step into the shoes of the receiver and assert on behalf of Caguas the claims that the receiver should have, but improperly failed to assert." Pet. App. A13. As the court explained, "[o]nce again," there is absolutely no indication that the tolling agreement "cover[s] such a suit." *Ibid.* Thus, "[i]f [the FDIC] has been derelict in the performance of its duties to Caguas, as [petitioners] complain, the proper remedy would have been a suit against [the FDIC], not one against the United States." *Ibid.*

Because the court of appeals concluded that petitioners were not entitled to invoke the tolling provision, it did not need "to address the question whether the statute of limitations applicable to the Court of Federal Claims is waivable by the Government, as was done under the tolling agreement here," and it accordingly "offer[ed] no opinion on that question." Pet. App. A14.

ARGUMENT

The court of appeals correctly held that petitioners' action is time-barred. Its decision does not conflict with any decision of this Court or of any other court of appeals, and it does not present any federal question of general significance. Further review by this Court therefore is not warranted.

1. Petitioners renew the argument that the statute of limitations on their *Winstar*-related claims was tolled by the September 29, 1995, agreement between the

RTC and DOJ, because they are third party beneficiaries of that agreement. Pet. 18-19. That argument is contradicted by the express terms of the tolling agreement, and was properly rejected by the courts below.

To the extent the tolling agreement is enforceable at all (see pp. 12-13, *infra*), it only preserves the right of the RTC (or its successor, the FDIC) to assert *Winstar*-related claims against the United States. As the court of appeals explained, "[o]rdinarily, only the parties to a contract have rights thereunder that they may enforce." Pet. App. A11. The parties to a contract "may create rights for the benefit of third persons." *Ibid.* But to create such rights, "the contract must 'reflect[] the express or implied intention of the parties to benefit the third-party,'" and the third party "must fall within a class clearly intended to be benefitted thereby." *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (quoting *Schuerman* v. *United States*, 30 Fed. Cl. 420, 433 (1994)); see also *Williams* v. *Fenix & Scisson, Inc.*, 608 F.2d 1205, 1209 (9th Cir. 1979) ("Contracting parties are presumed to act only for themselves unless there is a clear expression of an intent to benefit a third party."); Restatement (Second) of Contracts §302(l) (1979). The interagency agreement between the RTC and DOJ in no way indicates an intent to confer rights on any third parties, and there is accordingly no basis for concluding that petitioners fall within any "clearly intended" class of beneficiaries.

The agreement purported to toll the "running of the statute of limitations for all Goodwill Claims *the RTC* may possess." Pet. App. A11 (quoting agreement) (emphasis added). The agreement refers in multiple places to the claims that "the RTC may possess," see *id.* at A11-A12 (quoting provisions), and nowhere suggests that it applies to claims possessed by any other party,

let alone an entire class of unnamed parties. The agreement also provides that "the parties [*i.e.*, the RTC and DOJ] shall attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess." *Id.* at A11 (quoting agreement). As the court of appeals concluded, construing the agreement to include perhaps thousands of additional parties—former shareholders and members of failed thrifts—would all but guarantee that litigation would *not* be avoided and would eliminate any possibility of an "amicabl[e]" resolution of such claims. *Id.* at A12; see *id.* at A7 (quoting preamble). That would plainly frustrate the intent of the parties by subverting the carefully crafted alternative dispute resolution process set forth in the September 29, 1995, agreement.[1]

Petitioners cite two district court cases for the proposition that a tolling agreement can be extended to unnamed individuals. See Pet. 19 (citing *MCC Proceeds, Inc.* v. *Whitman & Ransom*, No. 95 Civ. 10086, 1997 WL 289470, at *6-*8 (S.D.N.Y. May 30, 1997); *Lindner Dividend Fund, Inc.* v. *Ernst & Young*, 880 F. Supp. 49, 55 (D. Mass. 1995)). The cases on which peti-

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[1] Indeed, because petitioners have alleged (Pet. 13-14) only vague conflicts of interest stemming from the FDIC's different statutory duties, allowing suit in this case would permit numerous former members and shareholders of failed thrifts to file time-barred, *Winstar*-related claims. Allowing those claims to proceed would have the anomalous result of giving private plaintiffs (including petitioners here) more leeway to litigate such claims than that possessed by the FDIC. As discussed above, under the September 29, 1995, agreement, the FDIC is not permitted to bring goodwill claims until after the *Winstar* action has become final and a 120-period has passed without any settlement. While they rely on the tolling agreement to resurrect their *Winstar*-related claims, petitioners obviously have no intention of abiding by the agreement's provisions limiting when those claims may be brought.

tioners rely, however, in fact reaffirm that a tolling agreement is enforceable only by those persons that are clearly identified in the agreement, or that fall into a class of individuals that is so identified. Thus, the court in *MCC Proceeds* rejected the argument that "individual partners" were not covered by a tolling agreement that expressly provided that it was "binding upon [the partnership] and *its partners*." 1997 WL 289470, at *2 (emphasis added). Cf. *Resolution Trust Corp.* v. *Bonner*, 848 F. Supp. 96, 99 (S.D. Tex. 1994) (individual partners of a law firm were not bound by a tolling agreement signed by the law firm because the agreement bound the law firm but not "its partners."). Likewise, the court in *Lindner Dividend* recognized that, even though they were not individually named in the agreement, plaintiffs who were members of a class in a class action were covered by a tolling agreement that expressly applied to "all putative class members." 880 F. Supp. at 55.

This case could not be more different. The pertinent provisions of the tolling agreement in this case, as well as its express purpose, unambiguously point to the conclusion that only the named parties—*i.e.*, the RTC and DOJ—are covered.[2]

2. Petitioners also claim (Pet. 14) that they should be permitted to step into the shoes of the FDIC to bring *Winstar*-related claims on behalf of Caguas that the FDIC thus far has not pursued. But, as the court of appeals concluded, the "reasoning in denying [petitioners'] third-party beneficiary claims also requires

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[2] Nothing in the September 29, 1995, agreement prevented petitioners from filing a timely lawsuit on their own—as did the plaintiffs in more than 40 other *Winstar*-related actions, in timely asserting claims involving thrifts in receivership.

rejection of their alternative argument that the tolling agreement itself covers Caguas, on whose behalf they are suing"; "Caguas was not a party to that agreement, and it did not become one merely because any recovery [the RTC] might obtain on Caguas' claims would be for Caguas' benefit." Pet. App. A12-A13. Once again, that conclusion is dictated not only by the terms of the September 29, 1995, agreement, but also by its purpose. The agreement was intended "to freeze the situation until *Winstar* was finally determined, in the hope that thereafter the remaining supervisory Goodwill Claims that [the RTC] possessed—including those of Caguas —could be amicably settled without litigation." *Id.* at A13. Construing the agreement to allow Caguas to bring the time-barred claims in this case would thwart that purpose by "facilitat[ing] litigation in the interim by savings and loan institutions themselves." *Ibid.*[3]

Petitioners suggest (Pet. 13) that the courts must nevertheless permit this action to proceed in order to prevent the FDIC from "squandering" valuable claims belonging to the receivership, since the FDIC assert-

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[3] Furthermore, Congress has provided that the shareholders or members of a thrift in receivership may not exercise any particular function of the receivership unless the receiver expressly delegates that function:

> [The FDIC] may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which [the FDIC] has been appointed conservator or receiver.

12 U.S.C. 1821(d)(2)(C). OTS regulations are to the same effect. See 12 C.F.R. 558.1(b)(7). Thus, because the FDIC has not expressly delegated to petitioners the function of litigating *Winstar*-related claims on the FDIC's behalf, petitioners are not entitled to usurp that function. None of the common law or contract principles cited by petitioners alters that conclusion.

edly has a conflict of interest in proceeding with *Winstar*-related claims on behalf of failed thrifts such as Caguas. The FDIC has not acted in dereliction of its statutory duties. And in any event, as the court of appeals explained, "[i]f [the FDIC] has been derelict in the performance of its duties to Caguas, as the Members complain, the proper remedy would have been a suit against [the FDIC], not one against the United States." Pet. App. A13; see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994) (in its receivership capacity, "the FDIC is not the United States"). Allegations of malfeasance or conflicts of interest on the part of the FDIC do not relieve petitioners from the statute of limitations on the *Winstar*-related claims that they seek to raise—years late—in this case *against the United States*.[4]

3. Finally, as noted above, substantial doubt has arisen over whether the tolling agreement between the RTC and DOJ is enforceable at all. The Court of Federal Claims has recently held that the agreement is "a legal nullity" on the ground that "[t]he limitations

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[4] Contrary to petitioners' assertion, the FDIC never "consented to participate in the prosecution of these *Winstar*-related goodwill claims." Pet. 21; see Pet. 4-5, 9, 16 (implying that the FDIC sought to become a party to advance its *Winstar*-related claims). Rather, the FDIC consented to appear before the Court of Federal Claims for the limited purpose of requesting the court "to explicitly rule that [any jurisdictional] order applies only to plaintiffs, and not the FDIC as owner of the underlying claim." Involuntary Pl. FDIC's Mem. Regarding Applicable Statute of Limitations 3. The Court of Federal Claims never ordered joinder of the FDIC, and later recognized that the "FDIC is not yet a party to this action." Order (Jan. 7, 1999). On appeal, the FDIC participated solely as amicus curiae to urge affirmance, arguing that petitioners were not entitled to any benefit under the tolling agreement, and that FDIC had fulfilled its duties to Caguas.

period applicable to the actions brought in this court is a condition that attaches to the sovereign's waiver of immunity from suit," and that this condition cannot be waived by "litigating parties." *Castle* v. *United States*, No. 90-1291 C, 2000 WL 1690248, at *4 (Fed. Cl. Nov. 9, 2000). See also *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1576-1577 (Fed. Cir. 1988).[5] The courts below did not need to reach that issue because they correctly concluded that petitioners were not entitled to rely on the tolling agreement in the first place. See Pet. App. A14. Nevertheless, the serious doubt that exists with respect to the validity of the tolling agreement *vel non* provides an additional reason to deny review in this case.[6]

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[5] The question whether the tolling agreement is valid is also currently pending before the Federal Circuit in *Landmark Land Co.* v. *United States*, Nos. 00-5073 & 00-5074 (filed Apr. 10, 2000).

[6] Contrary to petitioners' assertion (Pet. 7), the court of appeals did not seek to "immunize" the government from the consequences of *Winstar*. Rather, it merely applied settled principles of law and concluded that the particular claim in this case was time-barred. Accordingly, there is no conflict between the court of appeals' decision below and *Winstar*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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